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IN THE

Supreme Court of the United States

October Term 1964

No. 616

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District of the State of California.

I.

STATEMENT OF THE CASE.

This action was commenced by Respondent in the Superior Court for the County of Los Angeles, State of California, to recover a refund of a portion of the business license tax collected from Respondent by the Petitioner, City of Los Angeles. Respondent contended, and still contends, that the tax it sought to recover is a tax on "exports", prohibited by the United States Constitution.[1]

The business license tax in question is imposed upon Respondent for the privilege of engaging in business

[1] U. S. Const. Art. I, § 10, cl. 2.

within the city and is measured by Respondent's gross receipts from retail sales. The only portion of the tax that is in question is the portion attributable to the inclusion in the measure of Respondent's tax of gross receipts from certain sales to the United States Government, which Respondent contends were sales for export.

The relevant facts concerning these sales are simple and are not in dispute. All were sales of oil products to the United States for shipment abroad pursuant to written contracts. [R. Clk. Tr. pp. 22, 24.] Prior to delivery the Government arranged for shipment to foreign destinations and obtained all necessary export clearance papers. [R. Clk. Tr. p. 9.] Respondent made delivery either by pumping said products directly into a merchant ship or by delivering them to a port of embarkation for shipment aboard merchant ships or United States Government vessels. All of such products were then shipped to places outside of the United States (excluding territories) and consumed in overseas operations, including the operation of military aircraft and vehicles. [R. Clk. Tr. p. 22.]

The Trial Court held Respondent was entitled to the refund on the ground that to the extent the tax was computed on gross receipts from the sales in question, it was a tax on exports and was prohibited by the United States Constitution. [R. Clk. Tr. p. 27.] The Trial Court's judgment was unanimously affirmed by the California District Court of Appeal. [R. Opinion 10.] Subsequently, the City's Petitions to the District Court of Appeal for a Rehearing, and to the California Supreme Court for a Hearing, were denied. [R. Order of June 3 and Order of July 29.]

II.

ARGUMENT.

POINT A.

The Petition Presents Questions Which Are Not Raised by the Facts or Legal Issues of This Case, or the Decision of the State Court.

Although the "Statement" in the Petition relates some of the circumstances of this case, the most important facts are studiously ignored in Petitioner's presentation and discussion of the issues and decision of the State Court. Instead, Petitioner discusses the application of the import-export clause to entirely different *hypothetical* transactions which lack the crucial facts that were present in the transactions that are the basis of this litigation.

The Petition refers only to transactions wherein a purchaser of articles of a type that could immediately be consumed, "announces" or "represents" to a domestic vendor that he is going to take them out of the country for consumption. Certainly under such limited facts there might be some question as to whether the sale would be exempt from tax even if the articles were actually taken abroad and consumed by the purchaser. If at the time the articles were delivered to the purchaser there was no certainty that they would not be diverted into domestic use, they could not be considered to have begun their export journey at the time the tax was imposed and would not be exempt—*i.e.*, they would not yet be "exports".

It is well settled, however, that goods sold for export —and the gross receipts from the sale of such goods —are exempt from taxation if there is certainty that

the goods are headed for a foreign destination and will not be diverted to domestic use. Where the goods are delivered by the seller to a carrier for shipment abroad, the required certainty of export is established. *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946); *Empresa Siderurgica v. County of Merced*, 337 U. S. 154 (1949); *Joy Oil Company v. State Tax Commission*, 337 U. S. 286 (1949); *Gough Industries, Inc. v. State Board of Equalization*, 51 Cal. 2d 746, 336 P. 2d 161 (1959), cert. den. 359 U. S. 1011 (1959); *Eardley Fisheries Company v. City of Seattle*, 50 Wash. 2d 566, 314 P. 2d 393 (1957).

The difference which Petitioner ignores between the hypothetical transactions discussed in the Petition and the transactions in the instant case is not only critical, but obvious. Whereas Petitioner's hypothetical transactions probably do not meet the requirements for exemption under the aforementioned cases, the transactions in the instant case clearly do meet those requirements. The Government purchased the oil in question by written contract. When oil was desired for over-seas consumption, the Government placed an order with Respondent, arranged for vessels to ship it to foreign destinations, obtained necessary clearance papers for export, and gave Respondent specific delivery instructions indicating that it was a purchase for export. Such oil was then delivered by Respondent directly to vessels or points of embarkation and shipped to foreign destinations before it was consumed by the Government.

Thus, unlike Petitioner's hypothetical transactions, when the tax in question was imposed the purchased products were *irrevocably committed to export*, and had become exempt from taxation under the authorities cited

supra. Indeed, in *Richfield Oil Corporation v. State Board of Equalisation, supra,* oil was sold and delivered to a purchaser under circumstances identical to those here in all material respects, and this Court held that a tax on the receipts from such sale was prohibited by the import-export clause.[2]

Respondent submits, therefore, that the questions presented in the Petition for Certiorari, based for the most part on facts which are not only hypothetical but critically different from the actual facts presented, simply do not provide any proper ground for this Court to review the decision of the State Court in this case.

POINT B.

The State Court Decision in This Case Is Not in Conflict With the Holding in Hostetter v. Idlewild Bon Voyage Liquor Corporation,[3] or Any Other Decision.

Petitioner erroneously contends that the State Court's decision in the instant case extends the protection of the import-export clause beyond any application found in previous cases presenting analogous facts. Not only has Petitioner ignored the *Richfield* case, as previously discussed, but the cases upon which Petitioner relies are not even applicable.

Petitioner's interpretation of this Court's recent decision in *Hostetter v. Idlewild Bon Voyage Liquor Corporation, supra,* is erroneous. In the first place, that case

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[2]Petitioner has never denied the close factual similarity between Richfield and the instant case on this issue, but does attempt to distinguish it on other grounds. It is Respondent's position, however, that such distinction is entirely irrelevant. Petitioner's basis for distinction is discussed *infra* in this Brief.

[3]377 U. S. 324 (1963).

had nothing to do with the question of when goods sold for export become exempt from local taxation. Although the goods sold in *Hostetter* were clearly exports, the opinion expressly points out that the import-export clause was not involved because no tax had been imposed.[4] Nor are the issues involved there more than remotely analogous to those in the instant case.

The principal issue in *Hostetter* was whether the state of New York had the right under the Twenty-First Amendment to the United States Constitution to prohibit the retail sale of intoxicants to International Airline travelers at the airport, where such sales were made with the supervision and approval of the Federal Bureau of Customs. This Court held that while the state generally could regulate the transportation of intoxicants within its territory to avoid their diversion into domestic channels, the Commerce Clause deprived the state of the power to totally prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its power to regulate foreign commerce.

Although it is obvious that a sale of intoxicants for consumption abroad may at the same time be exempt from taxation because it is an export, and exempt from state prohibition because it is in foreign commerce, it should be equally obvious that the limitations and requirements concerning each type of exemption are not identical. Notwithstanding this fact, and that the Court in *Hostetter* was expressly limiting its considerations to the question of whether the Commerce Clause or the Twenty-First Amendment controlled the particular situ-

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[4] *Hostetter et al. v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 327 n. 3 (1963).

ation under review, Petitioner somehow reads from that decision a broad requirement that goods sold for export cannot be delivered to the purchaser in this country, but must be delivered to him in a foreign country if the transaction is to be exempt from local regulation *or taxation.*

This interpretation of *Hostetter* by Petitioner is wrong not only because that decision does not apply to an import-export clause case, but, even more important, *because it does not even say that foreign delivery to the purchaser, is mandatory for the Commerce Clause to control over the Twenty-First Amendment.* Indeed, the delivery in *Hostetter* was not significantly different from the deliveries in *Richfield* and the instant case. In all of them delivery was made by the seller directly to a departing carrier for shipment abroad before consumption. It is submitted, therefore, that *Hostetter* cannot by any process of reasoning be regarded as authority for the proposition for which Petitioner has cited it. If anything, it *supports* the decision of the State Court. Such indirect support is not critical, however, in light of *Richfield* and the other cases cited herein which are squarely in point and fully refute Petitioner's belief that foreign delivery by the seller is a requirement for an export exemption.

With respect to the other cases relied upon by Petitioner for this point, they distinguish themselves. They do not even involve exported goods, but deal only with taxation of interstate commerce. There is no question but that the rules with respect to taxation under the Commerce Clause do not apply in the case of an export. *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 75 (1946).

POINT C.

The Transactions in Question Were Clearly "Exports" Within the Meaning and Contemplation of the Import-Export Clause.

Petitioner cites, out of context, a number of definitions of the term "export", and selected language from various cases, in an effort to support the contention that the oil in question was not "exported" because it was purchased by the United States Government for consumption abroad, rather than a foreign purchaser. When such definitions and language are examined in their proper context, however, it is apparent that they do not sustain Petitioner's position.

For example, the requirements cited that goods must be united with the mass of goods belonging to (or within) a foreign country, and that there must be foreign commerce, merely mean that the goods must be shipped out of the United States and land in a foreign country (as distinguished from interstate commerce) with an intent that they remain there permanently or otherwise be used and consumed there. They do not stand for the proposition that there must be a sale to a foreign purchaser. Similarly, the language cited referring to "control of a foreign purchaser",[5] and "dominion vesting" in a "foreign power",[6] was intended to mean that when the goods were delivered to the purchas-

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[5] *Richfield Oil Corporation v. State Board of Equalisation*, 329 U. S. 69, 83 (1946).

[6] *Matson Navigation Co. v. State Board of Equalisation*, 136 Cal. App. 2d 577, 583, 289 P.2d 73 (1955).

er's vessel for shipment abroad, they became irrevocably committed to a foreign destination. Such language has never been understood to require that a foreign purchaser or government must acquire legal title, jurisdiction or control over the goods.

It is not true, as Petitioner contends, that the State Court in the instant case found the transactions to be exports without there being any foreign commerce. The requirement of foreign commerce was met in this case just as it was in *Richfield*, "for concededly the oil was sold for shipment abroad".[7] Indeed, all of the requirements for an export were met in the instant case just as clearly as they were in *Richfield*. Petitioner's sole basis for distinguishing that case is that the purchaser there was foreign, whereas here it was domestic. It has been shown, however, that there is absolutely no authority which requires such a distinction. On the contrary, there is authority which both expressly and impliedly rejects it: *Eardley Fisheries Company v. City of Seattle, supra;* Rev. Rul. 63-163 (1963-2 C.B. 536); Rev. Rule 56-375 (1956-2 C.B. 818); S.T. 939 (1951-2 C.B. 216).[8]

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[7]*Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 78 (1946). Furthermore, Petitioner is not being consistent with its own reliance on *Hostetter* since the whole basis for that decision was that the transactions there involved, *including sales to domestic purchasers for consumption abroad*, were transactions in foreign commerce. In fact Petitioner admittedly would regard those transactions as being exempt "exports".

[8]These Treasury rulings deal with federal rather than state taxation, but are relevant because the federal government is under the same prohibition as the states with respect to taxation of "exports". U. S. Const. Art. I, § 9, cl. 5.

Nor is there any *logical* reason why a distinction should be made between domestic and foreign purchasers. The purpose behind the import-export clause was to protect *sellers* in non-seaport states from having their products taxed unfairly by states that were favored with good seaports when such products were shipped abroad. *Hooven and Allison Co. v. Evatt,* 324 U.S. 652 (1944). The framers of the Constitution decided that the best way to avoid such discrimination was to prohibit taxation on all goods shipped out of the United States to foreign countries. There is certainly nothing in the constitutional history of the import-export clause to even suggest, let alone require, that any distinction was to be made where the purchaser happened to be an American.

Hence it is utterly immaterial whether the purchaser is domestic or foreign, or whether a foreign government does or does not have the right by treaty or otherwise to exercise physical control or jurisdiction over the goods. So long as the goods are in fact sold by a domestic seller for shipment abroad, and are delivered to a vessel and shipped to a foreign country for consumption, the transaction falls squarely within the purpose behind the export exemption. It is submitted that the transactions in question were precisely the type which the import-export clause intended to cover, and Respondent was entitled to the protection conferred by that clause regardless of who the purchaser was.

POINT D.

The State Court Decision Does Not Have the Consequences Petitioner Envisions With Respect to State and Local Tax Administration.

The decision of the State Court in this case does not stand for the proposition alleged by Petitioner. Petitioner states the decision in terms of Petitioner's own hypothetical facts instead of the actual facts, ignoring completely the critical difference heretofore discussed. Necessarily, therefore, the dire consequences Petitioner foresees from the decision are unrealistic.

Vendors are not, as Petitioner seems to fear, compelled by this case to grant an exemption from local taxes to anyone who walks in off the street and purchases a consumable item, simply because he states that he intends to consume it in a foreign country. A transaction cannot qualify for exemption under the State Court's decision unless it also qualifies under *Richfield* and a long line of other decisions.

Conclusion.

Since the State Courts have decided after fully considering this case that the State, acting through Petitioner, did not have the power to levy the tax in question, and since that decision was fully in accord with established principles of constitutional law, the petition for writ of certiorari should be denied.

Respectfully submitted,

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